IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

WILMINGTON HOUSING AUTHORITY,	)	
Plaintiff,	)	
v.	)	C.A. No. N22C-05-060 CLS
DESIGN CONTRACTING, INC.,	)	
Defendant.	)	

Date Submitted: March 3, 2023
Date Decided: May 18, 2023

Upon Defendants' Motion for Summary Judgment. **DENIED.**

ORDER

Christopher M. Lambe, Esquire, Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware, 19801 Attorney for Plaintiff, Wilmington Housing Authority.

Donald L. Gouge, Jr., Esquire, Donald L. Gouge, Jr., LLC, Wilmington, Delaware 19801, Attorney for Design Contracting, Inc.

SCOTT, J.

INTRODUCTION

Before the Court is Defendant Design Contracting, Inc.'s ("Design") Motion for Summary Judgment ("Motion"). Upon consideration of the Motion and Plaintiff Wilmington Housing Authority's ("WHA") response, Defendants' Motion is **DENIED** for the following reasons.

BACKGROUND

WHA demolished the Riverside Apartment complex in the late 2000s or early 2010s in several phases. An early phase involved demolition of buildings south of Todds Lane, east of Rosemont Avenue, along East 27th Street, and Edgemoor Avenue. According to the documents, as of May 29, 2009, the buildings still existed. By 2013, however, those buildings were gone.

Sometime after the demolition of buildings south of Todd's Lane, and east of Rosemont Avenue, WHA put out for bid a contract to demolish another section of the housing projects in area south of Todd's Lane, between Bowers Street and Rosemont Ave that contained 14 or 15 buildings.

According to the Complaint, Design submitted a bid to demolish the buildings in this section. This section, and its contract, was referred to as "Phase II." The site boundary was outlined, and the buildings included in Phase II. This area contained 13 buildings, and an additional building is labelled as "Alternate Add-On #1." The

complaint states that the "work included 22 residential buildings." The contract diagrams and notes, however, show 13 buildings, and 1 possible "add on." The contract attached to the complaint is for an area that contains different buildings than what is the subject of the expert reports produced by WHA. The work at issue in the complaint was completed prior to 2013. The contract attached to the complaint is for another area, in which the work was started in 2014 and completed in 2015.

The contract at issue in this matter called for removal of foundation walls and slabs, as well as foundation walls and footers. The contract also stated that below-grade areas and voids would be filled with "clean fill materials." The contract also stated that "Compaction testing is not required." Further, the contract specified that 4 inches of topsoil would cover areas previously occupied by buildings or structures. The contract between the parties required inspections. "All items proposed to be delivered by the bidder shall be subject to inspection and acceptance or rejection." The contractor guaranteed the work performed would remain free from defects resulting from defective workmanship for 1 year from the date of final acceptance of the contract.

Design was awarded the Phase II contract and commenced with demolition, removal of the buildings, and filling in the voids where the buildings used to be. In mid-2015, the parties recognized that the contract had been fulfilled, and memorialized this in writing. The Certificate of Completion stated in its first

sentence that "all work and materials have been carefully inspected by duly authorized representatives or agents of Wilmington Housing Authority[.]" The date of Completion was recognized as May 1, 2015.

On June 24, 2015, Design sent a contractor's certificate and release notifying WHA that the work performed pursuant to the contract had been performed in accordance with its terms. The Complaint indicates that final payment to Design was made on July 9, 2015, and Design acknowledged receiving the final payment.

Over four years later, in September 2019, WHA broke ground on an area of Riverside that had housing projects demolished years prior. The Complaint does not state where this area was. The Complaint alleges that that footers were found, and Design failed to remove them. An engineering firm was hired to inspect the subsurface. The firm issued a report indicating that some foundation slabs and footers remained, in Phase I, a different area than the one that is the subject of the contract at issue here. The report pertaining to Phase II states that some concrete slabs remained underground. WHA also alleges that Design breached the contract by "failing to provide clean and suitable fill materials." WHA proceeded to hire another company to remove footers, concrete slabs and other fill materials it deemed unsuitable.

WHA asserts that Design materially breached the contract by failing to remove the footers and replace them with clean fill material. WHA further alleges that Design "intentionally concealed the existence of the Footers" by covering them with at least three feet of fill material, "making their existence inherently unknowable." WHA then alleges that Design made "fraudulent misrepresentations about the concealed Footers" with the intent "to put [WHA] off the trail of inquiry." WHA further states it was "blamelessly ignorant" and could not have known about any defects in Design's workmanship until September 2019.

PARTIES CONTENTIONS

Design's Position

Design argues WHA complaint was filed outside of the statute of limitations. Design explains the statute of limitations cannot be tolled because WHA failed to plead with sufficient particularity that the Discovery Rule applies as WHA failed to show the injury was "inherently unknowable" or that WHA was "blamelessly ignorant". Design contends the injury was not inherently unknowable because some footers and slabs of foundation were not removed and could have been discovered by physically observing the work being performed at the time of performance. Additionally, Design believes the injury was not inherently unknowable because the

injury could have been discovered by radar inspection or through an engineering inspection via boring samples.

WHA Opposition

WHA argues the Discovery Rule and the doctrine of fraudulent concealment apply here because (i) WHA was blamelessly ignorant of the existence of the concrete foundations, which were buried two to ten feet below the surface, making them inherently unknowable and (ii) Design fraudulently misrepresented in sworn and notarized statements that the work required under the Contracts as completed according to their terms. As such, WHA argues Design tacitly admitted that it did not completely remove the concrete foundations and acknowledged that the WHA remained ignorant of what remained underground. WHA further points out that Design then lied to WHA to lull it into a false sense of security and throw it off the trail of inquiry. Thus, WHA assert the initial statute of limitations provided under 10 Del. C. § 8106 was tolled until September 2019 when WHA first discovered the concrete foundations, so its suit is timely.

Additionally, WHA argues Design chose not to issue interrogatories or take depositions—a decision that resulted in a record replete with issues of fact precluding the Court from granting summary judgment in favor of Design.

STANDARD OF REVIEW

Under Superior Court Rule 56, the Court may grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law."[1] The moving party bears the initial burden of showing that no material issues of fact are present.[2] Once such a showing is made, the burden shifts to the non-moving party to demonstrate that there are material issues of fact in dispute.[3] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.[4] The Court will not grant summary judgment if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law.[5]

ANALYSIS

The Court finds there are genuine issues of material fact present in this case and the moving party has not demonstrated it is entitled to judgment as a matter of law. The question of whether WHA knew or should have known of the alleged

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[1] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[2] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[3] *Id.* at 681.
[4] *Burkhart*, 602 A.2d at 59.
[5] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *Phillip-Postle v. BJ Prods., Inc.*, 2006 WL 1720073, at *1 (Del. Super. Ct. Apr. 26, 2006).

wrong is a question of fact that precludes this Court from granting summary judgment.

Generally, an action where damages arise out of a promise must be brought within three years.[6] "The statute may be tolled, however, under the 'time of discovery rule,' also known as the 'doctrine of inherently unknowable injuries," if the cause of action is inherently unknowable and the plaintiff was blamelessly ignorant of the cause of action, or if the defendants fraudulently concealed the cause of action. For the doctrine to be applicable, a plaintiff must establish that there were no observable or objective factors to alert her to the injury and that she was blamelessly ignorant."[7] The cause of action will not accrue until Plaintiffs "had notice there was something wrong [with the foundation] or until, by the exercise of reasonable diligence and care, they could have discovered the defect."[8] In *Bromwich v. Hanby*, plaintiffs allege they could not have discovered the buried foundation defects until a later time, just like the facts under this case.[9] That Court found when plaintiffs knew or should have known of the alleged wrong is a question of fact that precludes the granting of summary judgment. This Court agrees that the question of whether WHA knew or should have known is material question of fact that should

[6] 10 Del. C. § 8106.
[7] *Lee v. Linmere Homes, Inc.*, 2008 WL 4444552, at * 3 (Del.Super.Oct.1, 2008).
[8] Travis v. Taralia, 1986 WL 4856, at *3.
[9] *Bromwich v. Hanby*, 2010 WL 8250796, at *4 (Del. Super. Ct. July 1, 2010).

not be determined on summary judgment. As such, Design's Motion for Summary Judgment is **DENIED** on that ground.

This Court will not address WHA's argument that Design's decision not to issue interrogatories or take depositions should preclude this Court from granting summary judgment in favor of Design, as the Motion is **DENIED** for other grounds.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is **DENIED.**

IT IS SO ORDERED.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.